91-715

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NO._____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

AL C. PARKE, WARDEN — PETITIONER

- versus -

RICKY HAROLD RALEY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fourteenth Amendment requires that the prosecution prove the validity of a prior conviction offered for sentence enhancement by "clear and convincing evidence", when the state court's record of the prior conviction shows that the defendant was represented by counsel but is silent as to whether a Boykin v. Alabama, 395 U.S. 238 (1969), colloquy was given?

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IN THE
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AL C. PARKE, WARDEN — PETITIONER

- versus -

RICKY HAROLD RALEY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Al C. Parke, Warden of the Kentucky State Reformatory and the Attorney General of the Commonwealth of Kentucky Petition for Writ of Certiorari to review of the judgment of the United States Court of Appeals for the Sixth Circuit, granting a conditional writ of habeas corpus in favor of the respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth (A3-A21) is reported as Raley v. Parke, ___F.2d ___ (6th Cir. 1991).

The opinion of the United States District Court for the Western District of Kentucky is not reported. (A21-A25) (March 15, 1990). The opinion of the Kentucky Court of Appeals affirming the conviction is not reported (A26-A33) (April 22, 1990). By order entered June 21, 1988, the Kentucky Supreme Court denied respondent's motion to review the opinion of the Kentucky Court of Appeals. (A7).

JURISDICTION

The judgment sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit decided and filed September 19, 1991. Raley v. Parke, ____ F.2d ___ (No. 90-5446) [Appendix cited as "A"] (A1-A3), affirming in part and reversing in part the judgment of the United States District Court for the Western District of Kentucky (Civil Action No. C-89-0756(L)(A) (A21-A-25). The jurisdiction of the United States District Court was invoked pursuant to title 28 U.S.C. §2254. (See A21). This Court has jurisdiction to review the opinion of the Sixth Circuit Court of Appeals pursuant to Title 28 U.S.C. §2254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law[.]

Title 28 U.S.C. Section 2254 provides:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States..
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process o the existence of circumstances rendering suc process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for he writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the state court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of he circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a

> determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the state cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
>
> (f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

Respondent was indicted on May 13, 1986, for the felony offenses of second degree robbery and for being a persistent felony offender in the second degree, which are the offenses for which he is presently incarcerated. (A27). [The Sixth Circuit opinion erroneously refers to burglary rather than robbery. (A4).] On November 11, 1986, respondent filed a motion to dismiss count two of the indictment, which was

the persistent felony offender charge. (R.3; TR 36). [A persistent felony offender conviction operates to enhance the offense for the underlying crime by automatically increasing the minimum and maximum permissible punishment. Ky.Rev.Stat. 532.080.] The state court hearing was held on May 28, 1987, and the Kentucky trial court ruled that both convictions sought to be used by the prosecution as evidence were constitutionally valid. (A32-33; A5-A8.)

The first prior conviction relied upon by the Commonwealth to prove the persistent felony offender status in this case was entered on January 3, 1980, in which Respondent received a sentence of five years on each count of a three-count indictment for burglary offenses. The second prior conviction relied upon by the Commonwealth for the persistent felony offender status was entered on October 8, 1981, in which respondent received a sentence of five years upon a plea of guilty to third degree burglary and second degree persistent felony offender. (A22-A25.)

In State court, respondent argued that each of these two prior convictions were invalid because the State court record did not contain the transcript of guilty plea proceedings nor did it contain a record of colloquy between the court and respondent during the plea proceedings. Respondent contended the pleas were invalid because there was no showing that he knowingly waived the rights guaranteed him under the United States and Kentucky constitutions. The prosecutor filed certified copies of the judgment entered on the guilty pleas on the prior convictions. The State trial court advised the respondent that this shifted the burden of going forward on his claim of invalidity to him. Respondent argued that under the precedent of the Kentucky Supreme Court, the trial court had correctly stated the law, but he believed that because the records of the two prior convictions contained a "silent record" the earlier plea should be presumed constitutionally invalid. Respondent then took the stand and testified concerning his

recollection of the guilty pleas. Respondent testified to the effect that he did not remember whether the trial judge advised him of his constitutional rights in connection with the guilty pleas and was not familar with trial procedures. (A27-A33.)

The Commonwealth called as its witness, Tom Marshall, who had represented respondent in connection with the 1980 guilty plea. Mr. Marshall could not recall his representation of respondent during his testimony at the State court evidentiary hearing, but he did authenticate his signature on a document identified as "form plea of guilty that was used back in . . . 1979." Mr. Marshall confirmed that the certificate on that form showed that he was the attorney of record for respondent, that he had read and fully explained to respondent the allegations contained in the indictment, that he had fully explained his constitutional rights to him, and to the best of his knowledge and belief the statements and representations made by respondent in a written petition on a

plea of guilty were accurate and true, and that the plea of guilty was consistent with counsel's understanding of the facts as relayed to him by respondent and was consistent with Marshall's advice to respondent. [The form testified to by Mr. Marshall and the State court was added to the habeas record pursuant to order by the federal court. Another type of guilty plea form indicating the Commonwealth's recommendation for a plea of guilty, and signed by Mr. Raley and his then attorney, was produced concerning the 1981 guilty plea pursuant to order by the Federal District Court. (A7-A8)] The State trial court denied respondent's motion to suppress the prior convictions. Respondent then entered a conditional guilty plea pursuant to Kentucky Criminal Rule 8.09 by which to appeal the order denying the motion to suppress the prior convictions used to establish the persistent felony offenders status. (A27-A33; A5-A7.)

On April 22, 1988, the Kentucky Court of Appeals affirmed respondent's conviction in an

unpublished opinion. The Kentucky Court of Appeals concluded that the 1981 guilty plea conviction was valid and that there was sufficient evidence before the trial court to ascertain in its validity. (A26-A33). The Kentucky Court of Appeals stated in part (A32):

> However, while appellant contends that he was ignorant of the charges against him, he acknowledges he signed a form which specifies the charges in which he agreed to plead guilty. Furthermore, the fact that appellant was fully advised of his rights in 1979 permits an inference that he was still aware of his rights two years later in 1981. In addition appellant's testimony indicates that his knowledge and sophistication regarding his rights under our judicial system increase substantially after his first conviction.

On June 13, 1989, the respondent filed a petition for writ of habeas corpus in the United States District Court for the Western District of Kentucky attacking his persistent felony offender sentence and in particular the 1981 guilty plea conviction upon which was based. The District Court denied the writ essentially argreeing with the Kentucky Court of Appeals. (A21-A26.)

On September 19, 1991, the Sixth Circuit issued an opinion upholding the 1980 guilty plea but concluding that the Commonwealth had failed to prove the validity of the 1981 guilty plea. The Sixth Circuit panel found that it was bound by the previous Sixth Circuit opinion in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990). (A13.) The Sixth Circuit stated in part (A10 and A20):

> [Respondent] correctly notes that in Dunn we established that a State may not carry its burden under Boykin by utilizing a presumption, and that any extrinsic evidence it offers must be clear and convincing. He once again correctly notes that we specifically disapproved in Dunn of the burden-shifting procedure that the trial court used in this case.. . . [T]he District Court is directed to grant Raley's writ of habeas corpus if Kentucky does not within ninety days hold a new hearing under. . . Dunn v. Simmons on Raley's contention regarding his 1981 conviction [Citations omitted].

REASONS FOR GRANTING THE WRIT

This case presents two issues regarding the burden of proof for an attack on a previous felony conviction to be used in enhancing the sentence for a subsequent crime. The first issue is whether the Kentucky Supreme Court was

correct in requiring the defendant as the claimant asserting the invalidity of a previous conviction to go forward initially with the introduction of evidence to support his claim that his previous conviction or guilty plea was invalid. Dunn v. Commonwealth, 703 S.W.2d 874 at 876 (Ky. 1985), cert. denied, 479 U.S. 832; Conklin v. Commonwealth, 799 S.W.2d 582 at 583-584 (Ky. 1990) [specifically declining to adopt the standard established by the Sixth Circuit in Dunn v. Simmons, 877 F.2d 1275 (6th Cir. 1989), cert. denied, 110 S.Ct. 1539 (1990)]. The Commonwealth of Kentucky contends that at least eleven other States and a majority of the circuits of the United States Courts of Appeals impose a similar burden on the defendant who collaterally attacks a prior conviction offered by the prosecution for a sentence enhancement. In addition, the Commonwealth contends that at least two circuits, the Seventh and Eleventh, have imposed the initial burden on the defendant who attacks a guilty plea under the habeas corpus statute, Title 28 U.S.C. §2254.

The second issue is whether the Sixth Circuit is correct in requiring the prosecution to satisfy the standard of "clear and convincing evidence" in establishing the validity of a previous conviction when the state court record is partially silent. The Commonwealth contends that no circuit of the United States Courts of Appeals other than the Sixth Circuit has imposed a "clear and convincing" burden of proof to establish the validity of a prior conviction as a requirement under the Due Process Clause.

The Sixth Circuit's opinion in this case is expressly based upon Dunn v. Simmons, supra. The Sixth Circuit's opinion in Dunn v. Simmons is expressly based upon Roddy v. Black, 516 F.2d 1380 (6th Cir. 1975) [denying habeas corpus relief]. Roddy v. Black was based primarily upon LeBlanc v. Henderson, 78 F.2d 481 (5th Cir. 1973), and Des Bouillous v. Burke, 418 F.2d 297 (1969). Des Bouillous expressly relied upon Wisconsin law to establish the "clearly convincing" burden of proof. See especially 418 F.2d at 300. Excluding Des Bouillous, Roddy and other Sixth Circuit opinions based upon Roddy,

no case cited by the Sixth Circuit and no case cited for respondent has imposed upon the prosecution the "clear and convincing" burden of proof to establish the validity of prior convictions. Previous Sixth Circuit opinions have placed the initial burden of going forward on the defendant or habeas petitioner. Robards v. Rees, 789 F.2d 379 at 385-386 (6th Cir. 1986); United States v. Sammons, 918 F.2d 592 at 604 (6th Cir. 1990). This Court has expressly rejected the "clear and convincing evidence" standard regarding the prosecution's burden of proof to establish a waiver of rights for a confession, and has instead adopted the preponderance of the evidence standard. Colorado v. Connelly, 479 U.S. 157 at 167-170 (1986); also see Patterson v. Illinois, 487 U.S. 285 at 299, N.12 (1988) [Miranda waiver rule derived from the Sixth Amendment right to counsel waiver case law]. This Court has also held that sentencing factors may be proved by a preponderance of the evidence. McMillan v. Pennsylvania, 477 U.S. 79 at 85 (1986). See also United States v. Lord, 711 F.2d 887 at 891,

n.3 (9th Cir. 1983); United States v. Newman, 912 F.2d at 1121-1122 (9th Cir. 1990) [preponderance of evidence standard adopted].

During the State trial court's evidentiary hearing in this case, the trial court required that the defendant present his evidence regarding his claim of invalidity before the Commonwealth presented its evidence. Pursuant to Dunn v. Commonwealth, 703 S.W.2d 876. In that case the Kentucky Supreme Court stated in part as follows:

> The presumption of regularity in judgment shall be sufficient to meet the original burden of proof. After the judgments of conviction are introduced, the burden shifts to the defendant to show any infringement of his rights or irregularity of procedure upon which he relies, such as those set out in Boykin v. Alabama, 395 U.S. 238 (1969), or other pertinent cases. If the defendant presents evidence, through his testimony or other affirmative evidence, which refutes the presumption of regularity, the burden then falls to the Commonwealth to prove that the underlying judgments were entered in a manner which did, in fact, protect the rights of the defendant. A silent record simply will not suffice.

Although not expressly noted in the Kentucky Supreme Court's opinion in Dunn, the procedure established in that case was a reiteration of

what the Kentucky Supreme Court had ruled previously in Phillips v. Commonwealth, 559 S.W.2d 724 (1977). In that case the Kentucky Supreme Court had relied primarily on this Court's opinion in Johnson v. Zerbst, 304 U.S. 458 at 468-469 (1938), and Chief Justice Reinquist's dissenting opinion in Loper v. Beto, 405 U.S. 473 at 499-502 (1972), in which he was joined by Chief Justice Burger, and Justices Blackmun and Powell. Also see id., 405 U.S. at 495-496 (Blackmun, J. dissenting); Id., 405 U.S. at 485 (White, J. concurring in judgment). In Loper v. Beto, Chief Justice Reinquist stated in part:

> In Johnson v. Zerbst, [supra], one of the landmark habeas corpus decisions of this Court, Mr. Justice Black said: "It must be remembered, however, that a judgment cannot be lightly set aside by collateral attack, even on habeas corpus. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. [Footnote omitted.] Where a defendant without counsel, acquiesces in a trial resulting in his conviction and later seeks relief by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. If in a habeas corpus hearing, he does meet

his burden and convinces the court by a preponderance of the evidence that he neither had counsel nor properly waived his constitutional right to counsel, it is the duty of the court to grant the writ."

. . . .

Under Johnson v. Zerbst, the burden in federal habeas corpus is upon him [the petitioner] to prove to the satisfaction of the federal habeas judge that he did not waive the right to counsel.. . . However, on the basis of his overall assessment of petitioner's credibility, the trial judge declined to believe these self-serving assertions. The uniform doctrine of cases, both in this Court and elsewhere, is that the finder of fact is entitled to wholly disbelieve the testimony of the interested witness.

The plurality of the court in Loper v. Beto,

405 U.S. at 479, n. 6, stated in part:

A dissenting opinion, post, at 502, implies that the District Court found that the petitioner did not meet his burden of proving that he had not waived his right to counsel in the Mississippi and Tennessee courts.

. . . .

But despite these observations, the Court of Appeals, perhaps recognizing the error in the statement of the District Court quoted above, did not rest its decision on a finding that the petitioner failed to meet his burden of proving the invalidity of the prior convictions. It reached the merits of the legal question involved, and we granted certiorari to review that decision. There is thus no basis in the record upon which we may either

> dismiss this case or affirm the decision below on the ground that the petitioner did not meet his burden of proving that the prior convictions were invalid. [Emphasis added.]

In Martin v. Ohio, 480 U.S. 228 at 232 (1987), the Court referred to its previous opinion in Patterson v. New York, 432 U.S. 197 at 210 (1977), in part as follows:

> We there emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion.

The United States Courts of Appeal, including the Sixth Circuit, have unanimously placed the burden of proof on the defendant to establish the invalidity of a prior conviction used for purposes of establishing the defendant's criminal history score under the federal sentencing guidelines. See United States Sentencing Guidelines, Title 18 U.S.C. Appendix, Commentary, Application note 6, Section 4A 1.2 and Section 4B 1.1. United States v. Unger, 915 F.2d 759 at 761 (1st Cir.

1990; United States v. Davenport, 884 F.2d 121 at 124 (4th Cir. 1989); United States v. Woods, 870 F.2d 285 at 287 (5th Cir. 1989); United States v. Bradley, 922 F.2d 1290 at 1297 (6th Cir. 1991); United States v. Brown, 889 F.2d 67 at 679 (7th Cir. 1990); United States v. Dickens, 879 F.2d 410 at 411-412 (8th Cir. 1989); United States v. Newman, 912 F.2d 1119 at 1121 (9th Cir. 1990). Also see United States v. Clark, 735 F.Supp. 861 (N.D.Ill. 1990), [placing burden on the defendant does not conflict with the decisions of this Court].

The Sixth Circuit opinion in this case cites Fox v. Kelso, 911 F.2d 563 at 570 (11th Cir. 1990), to support the Sixth Circuit's position that the entire burden of proving the validity of a conviction involving a silent record falls on the state in the habeas corpus proceeding. However, the Eleventh Circuit's opinion in Fox v. Kelso does not, in fact, establish such a burden. The Eleventh Circuit opinion in that case, states in pertinent part:

> In habeas challenges to the validity of a guilty plea, however, courts

> uniformly assigned to the state (once the petitioner satisfies his threshold burden of showing noncompliance with the requirements of Boykin v. Alabama, 395 U.S. 238 [1969]), the burden of showing that the plea was obtained constitutionally. [Parenthetical phrase in original. Footnotes and citations omitted. Emphasis added.] Although the decision in Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978), appears to place the burden on the petitioner, we conclude that it refers only to initial threshold burden on the petitioner to present a prima facie case. See [United States ex rel Grundset v.] Franzen, 675 F.2d [870] at 877 [7th Cir. 1982]. From the record, it is apparent that Fox demonstrated that his guilty pleas were not taken in accordance with the procedures mandated in Boykin, thereby shifting to the state the burden to prove that they were nonetheless knowing and intelligent. [Emphasis added.]

As the Sixth Circuit opinion points out the Eleventh Circuit in Fox v. Kelso collects a number of cases from other circuits. Eliminating the cases from the Sixth Circuit and eliminating cases involving guilty pleas prior to Boykin since Boykin has been deemed not to apply retroactively, Hendron v. Cowan, 532 F.2d 1081 (6th Cir. 1976) [collecting cases], only two circuits have apparently placed the initial burden on the prosecution to establish the

validity of a guilty plea involving a silent or partially silent state court record. United States v. Pricepaul, 540 F.2d 417 (9th Cir. 1976); Sena v. Romero, 617 F.2d 579 at 580 (10th Cir. 1980), which expressly relies upon Pricepaul. In Pricepaul, the Ninth Circuit did place the initial burden on the prosecution to establish compliance with Boykin if the state court record was silent. However, the Ninth Circuit also stated as follows, 540 F.2d at 423:

> In these circumstances, it seems unfortunate to shift the burden to the government to prove compliance with Boykin if the defendant is unwilling to submit an affidavit specifically alleging that he did not voluntarily and intelligently waive the rights protected by Boykin. Because of this, if we were writing on a clean slate, we would hold that the burden shifts to the government to prove the guilty plea was voluntarily and intelligently made only after the person convicted (1) demonstrates that the record is silent as to whether the Boykin procedures were followed (neutral showing) (and (2)) offers an affidavit or other testimony alleging that in fact the required waiver procedure did not occur (positive showing). [Parenthical phrases in original.]

Subsequently, the Ninth Circuit receded from the rule of Pricepaul and in effect now follows

the above quoted dicta. United States v. Goodheim, 651 F.2d 1294 at 1297-1299 (9th Cir. 1981), appeal after remand, 686 F.2d 776 at 777-778 (9th Cir. 1982) [upholding prior conviction]; also see United States v. Newman, 912 F.2d 1119 at 1121-1122 (9th Cir. 1990) [placing burden on defendant]; United States v. Dickens, 879 F.2d 410 at 411-412 (8th Cir. 1989) [discussing Goodheim II, and other cases].

As noted in the above the Eleventh Circuit's position in Fox v. Kelso, is consistent with Kentucky's position in placing the initial burden of producing evidence on the defendant (or habeas petitioner) on a collateral attack regarding a previous guilty plea. Also see Moore v. Jarvis, 885 F.2d 1565 at 1570 (11th Cir. 1989); id., 885 F.2d at 1573 (Cox, J, dissenting) ["It is clear in this circuit that the absence of a Boykin hearing does not, without more, subject the convictions in question to collateral attack."] [Judge Cox wrote the Fox opinion]; Strozier v. Newsome, 926 F.2d 1100 at 1104 (11th Cir. 1991). The Fifth Circuit and Eighth Circuit have placed the

burden on the defendant (or habeas petitioner) even when a state conviction is collaterally attacked under Title 28 U.S.C. Section 2254. Bouchillon v. Estelle, 628 F.2d 926 at 928 (5th Cir. 1980); Walker v. Maggio, 738 F.2d 714 at 717 (5th Cir. 1984), cert. denied, 469 U.S. 1112; Luna v. Black, 772 F.2d 448 at 450 (8th Cir. 1985).

As previously noted, the Seventh Circuit in United States ex rel. Grundset v. Franzen, 675 F.2d 870 at 877-880 (7th Cir. 1982), has placed the initial burden on the habeas corpus petitioner to establish the invalidity of a guilty plea under collateral attack. In that case the Seventh Circuit stated, 675 F.2d at 880

> We do not believe that an evidentiary hearing is necessary in this case. If such a hearing were held, the initial burden would be on the petitioner. Grundset, however, has repeatedly asserted that he is unable to offer any additional evidence as to what transpired at his guilty plea proceeding [other than the fact that he cannot remember]. In the absence of convincing independent evidence that Grundset was not admonished in accordance with Boykin, his petition for habeas relief must be denied. [Emphasis added.]

More recently, in cases involving collateral attacks on prior convictions in the state courts offered to enhance the defendant's sentence under either the Armed Career Criminal Act or Violent Career Criminal Act, Title 18 U.S.C. Section 924(e), Section 922(g), and Appendix Section 1202(a)(1), which imposes a minimum sentence of 15 years incarceration without the possibility of parole, the Seventh Circuit has posed the entire burden of proof to establish the invalidity of a previous guilty plea conviction upon the defendant. United States v. Gallman, 907 F.2d 639 at 642-644 (7th Cir. 1990); United States v. Polk, 908 F.2d 212 (7th Cir. 1990); United States v. Boyer, 931 F.2d 1201 at 1204-1205 (7th Cir. 1991) [Federal trial judge was entitled to discredit the defendant's own self-serving testimony]; United States v. Henry, 933 F.2d 553 at 559-560 (7th Cir. 1991); United States v. Ferguson, 935 F.2d 862 (7th Cir. 1991). Also see United States v. Wilkinson, 926 F.2d 22 at 28-29 (1st Cir. 1991), cert. denied, 111 S.Ct. 2813 [collateral attack on prior conviction offered for Career Criminal

Act enhancement rejected without proof by government]; United States v. Davenport, supra [same].

As the Eighth Circuit opinion in United States v. Dickens, 879 F.2d at 411-412 notes, in Luna v. Black, 772 F.2d at 448 at 450 (8th Cir. 1985), the Eighth Circuit placed the initial burden establishing invalidity of a guilty plea on the habeas petitioner. "Where, however, records of prior convictions are silent as to whether counsel was present at a critical stage and where the accused introduces evidence intending to show that he was not in fact so represented, the burden then shifts to the state to prove that the accused was represented." [Emphasis added.]

The California Supreme Court has recently reiterated its ruling that a defendant collaterally attacking a previous conviction has the initial burden of producing evidence to establish the conviction's invalidity. People v. Sumstine, 36 Cal.3d 909, 206 Cal.Rptr. 707, 687 P.2d 904 (1984); Curl v. Superior Court, 51

Cal.3d 1292 at 1303-1304, 276 Cal.Rptr. 49, 801 P.2d 292 (1990):

> [W]hen a defendant seeks to collaterally attack the validity of a prior-murder conviction alleged as a prior-murder special circumstance, the defendant has the burden of proof in establishing the constitutional invalidity of the prior conviction.

Ten other states apparently follow a rule similar to that of Kentucky and California regarding the defendant's burden in collaterally attacking a prior conviction offered for sentence enhancement. State ex rel. Collins v. Superior Court, Maricipa County, 157 Ariz. 71, 1751 P.2d 1346 (1988); Watkins v. People, 655 P.2d 834 at 837 (Colo. 1983); Lacy v. People, 775 P.2d 1 at 6-7 (Colo. 1989), cert. denied, 110 S.Ct. 350; State v. Wright, 198 Conn. 275, 502 A.2d 911 at 917 (1986); Hall v. State, 273 Ind. 507, 405 N.E.2d 530 at 536 (1980); State v. Wilson, 684 S.W.2d 544 at 548-549 (Mo.App. 1985);State v. Desbiens, 117 N.H. 433, 374 A.2d 651 at 653 (1977); State v. Harper, 126 N.H. 815, 498 A.2d 310 at 315 (1985) ["We conclude that he defendant has not met her burden under Desbiens of going forward with evidence"]; State v. O'Neil, 91 N.M.

727, 580 P.2d 495 at 497-498 (N.M.App. 1978); People v. Harris, 61 N.Y.2d 9 at 15, 471 N.Y.S.2d 61 at 63, 459 N.E.2d 170 at 172 (1983); People v. West, 110 A.D.2d 971, 488 N.Y.S.2d 268 at 270 (N.Y.App 1985), appeal denied, 65 N.Y.2d 989 [applying Harris]; State v. Annino, 46 Or.App. 743, 613 P.2d 84 (1980); State v. King, 400 N.W. 878 at 879 (S.D. 1987); Stuck v. Leapley, 473 N.W.2d 476 (S.D., 1991) [discussing King and Dunn v. Simmons]. Also see Ex Parte Scott, 460 So.2d 1371 at 1374 (Ala. 1984) [prior conviction may no be collaterally attacked in habitual criminal proceeding]; State v. Oliver, 230 Neb. 864, 434 N.W.2d 293 at 297-298 (1989) [same].

This Court has repeatedly stated that a federal habeas court may not constitutionally impose a higher burden on the state for a habeas corpus collateral attack that exists for direct appeal. "[T]he burden of justifying federal habeas relief for state prisoners is greater than the showing required to establish plain error on direct appeal." Engle v. Isaac, 456 U.S. 107 at 134-135 (1982). "[T]he presumption that a criminal judgment is final is at its strongest i

collateral attacks on that judgment." Strickland v. Washington, 466 U.S. 668 at 697 (1984). When a federal court is reviewing the claim of a state prisoner in a federal habeas corpus proceeding that federal court owes due respect to the state's procedural rules. See Coleman v. Thompson, 111 S.Ct. 2546 at 2565, 115 L.Ed.2d 640 (1991) ["We also eliminate inconsistency between the respect federal courts show for state procedural rules and they respect they show for their own."]. In Marshall v. Lonberger, 459 U.S. 422 at 438, n.6 (1983), the court stated in part:

> Central to our decision [in Spencer v. Texas, 385 U.S. 554 (1967)] was the fact that the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules: It has never been thought decisions under the Due Process Clause establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. 385 U.S., at 564. [Quotation marks and brackets omitted.]

In a collateral attack upon a state conviction (pre-Boykin) pursuant to a plea of guilty in Winford v. Swenson, 517 F.2d 1114 and 1117-1118 (8th Cir. 1975), cert. denied, 423 U.S. 1023, the Eighth Circuit stated:

> [T]he Supreme Court has made it clear that a counseled guilty plea made by a competent defendant aware of the nature of the charge against him and induced by his desire to limit the possible penalty will not be set aside simply because the defendant later learns of constitutional rights which he did not know at the time that the guilty plea was entered. A guilty plea entered with assistance of counsel is presumptively valid. It is clear in the specific findings of the state judge that Winford's plea was an effectively and accurately counseled plea made with full knowledge of the nature of the charge. These findings are entitled to a presumption of correctness with the burden on the habeas corpus petitioner to establish that such factual determinations were erroneous. [Citations omitted.]

In Marshall v. Lonberger, supra, 459 U.S. at 457, this Court expressly noted that Lonberger's "experience in the criminal justice system" could be considered in evaluating the validity of his guilty plea to a previous felony conviction used to enhance his sentence under Ohio law. The lower federal courts have reached a similar conclusion. See United States v. Hafen, 726 F.2d 21 at 25 (1st Cir. 1984), cert. denied, 466 U.S. 962. In LoConte v. Dugger, 847 F.2d 745 at 751 (11th Cir. 1988), cert.denied 488 U.S. 958, the Eleventh Circuit concluded,

"[A] guilty plea may be knowingly and intelligently made on the basis of detailed information received on occasions before the plea hearing." The Sixth Circuit apparently concluded that it was unconstitutional for the Kentucky Courts and the Federal District Court to presume that a defendant was aware of his constitutional rights on a guilty plea by reference of the fact that he was advised of his constitutional rights at a previous guilty plea within two years before the subsequent guilty plea because such an inference would require "us to treat persons with prior court experience differently than those for whom the current case is their first conviction." (A17). Thus, the Sixth Circuit's opinion in this case is contrary to Marshall v. Lonberger, supra, and other federal Courts of Appeals, that a court considering the validity of a guilty plea could consider the previous experience of the defendant in the criminal justice system in determining whether he knew his rights in connection with a plea of guilty.

Neither this Court nor any other United States Court of Appeals has ever required the prosecution to disprove the allegations of a suppression motion by "clear and convincing" evidence. A majority of the United States Courts of Appeals, including the Sixth Circuit, have placed the burden of proof upon the defendant who collaterally attacks a prior conviction introduced under the Federal Sentencing Guidelines. The Seventh and Eleventh Circuits, and apparently the Fifth, Eighth, and Ninth Circuits have placed the burden upon the defendant to prove the invalidity of a conviction collaterally attacked under the habeas corpus statute. Review by this Court is warranted to reconcile the conflict between the standard adopted by the Sixth Circuit solely for state prosecutions and the standard adopted by the other circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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